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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-

UNITED PARCEL SERVICE, INC.,
an Ohio Corporation,

UNITED PARCEL SERVICE, INC.,
a New York Corporation,

and

UNITED PARCEL SERVICE OF AMERICA, INC.,
a Delaware Corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION,
Respondents.

ARROW CARRIER CORPORATION, et al.,
Intervening Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR INTERVENING RESPONDENTS IN OPPOSITION

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SUBJECT INDEX

	Page
Preliminary statement	1
Argument	2
I	
The merger and control of United Parcel Service of America are not in the public interest since they will only serve to mask the illegal acts of its subsidiaries	2
II	
The decision by the Interstate Commerce Commission was in accord with the decisional precedents and the merger of United Parcel Service, Inc., a New York Corporation into United Parcel Service, Inc., an Ohio Corporation will constitute an acquisition of control within the meaning of Section 5(2) of the Interstate Commerce Act	7
Conclusion	13

TABLE OF AUTHORITIES CITED

Cases

	Page
Alleghany Corp. v. Breswwick & Company, 353 U.S. 151 (1957)	8, 9, 10, 13
Artim Transp. System, Inc.-Control and Merger-Glenn Cartage, 116, M.C.C. 812(1974)	11
Brink's Express Co. of Canada, Ltd.-Control-Direct Winters Transport, Ltd., 101 M.C.C. 639 (1966)	11
Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir.), cert. denied, 414 U.S. 975 (1973)	5
Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)	4, 5
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	6
Lorain Journal Co. v. United States, 342 U.S. 143 (1951)	6
Marnell, et al. v. United Parcel Service of America, Inc., et al., 1971 Tr. Cases ¶ 73,761 (N.D.Cal. 1971)	3
Neisloss v. Bush, 239 F.2d 873	10, 11
New York Central Securities Corp. v. United States, 287 U.S. 12 (1932)	8
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	6
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)	4
Restrictions on Service by Motor Carriers Ex Parte No. MC-77 (Sub. 1), 119 M.C.C. 691 (1974)	6
Superior Trucking Co.-Purchase-Daniel-Hamm, 109 M.C.C. 294 (1969)	11, 12
Transcontinental Bus System, Inc.-Control-American Buslines, Inc., 87 M.C.C. 795 (1961)	11
Thurston, Inc.-Control-Bush-Motor Freight, 116 M.C.C. 115 (1972)	11
Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)	4
United States v. Citizens & Southern National Bank, 45 L.Ed. 2d 41 (1975)	4
United States v. Marshall Transport Co., 322 U.S. 31 (1944)	7
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	5
United States v. Trenton Potteries Co., 273 U.S. 392 (1927)	5
United States v. Yellow Cab Co., 332 U.S. 218 (1947)	4
Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967)	5
Woods Industries, Inc.-Control-United Transports, Inc., 85 M.C.C. 675 (1960)	12

TABLE OF AUTHORITIES CITED

Statutes

	Page
Interstate Commerce Act:	
49 U.S.C. § 10101 et. seq.	7
49 U.S.C. § 11343-11344 [formerly § 5(2)]	7, 8, 10, 11
49 U.S.C. § 5(3)	10
49 U.S.C. § 11348 [formerly § 5(4)]	11, 14
49 U.S.C. § 5(6)	4, 5, 8
Sherman Act:	
15 U.S.C. §§ 1, 2	6

Other Authorities

Rules to Govern the Assembling and Presenting of Cost Evidence, 337 I.C.C. 298, 310-311 (1970)	4

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR INTERVENING RESPONDENTS IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted by intervening respondents Arrow Carrier Corp., A.F.T. Services, Inc., Alco Express Co., Barnet's Express, Inc., Borough Express, Inc., Bradley's

Express, Inc., Consolidated Carriers Corp., Esco Transport, Inc., Fowler Williams, Inc., Freedman's Express, Inc., Greenberg's Express, Inc., Hempstead Delivery Co., Inc., Mazzeo & Sons Express, Morton Delivery, New Deal Delivery Service, Siegel & Cohen Express, Inc., Stone's Express, Inc., Stuart Express Co., Inc., Tri-State Transportation Co., Inc., and United Marlboro Carrier Corp. in opposition to the Petition for a Writ of Certiorari filed by Petitioners United Parcel Service of America, Inc., et al.

Intervenors, the protestants in the proceeding before the Interstate Commerce Commission, in ordr to avoid repetitious argument or restatement, adopt the argument advanced by Respondents United States of America and Interstate Commerce Commission ("Commission"), except to the extent hereinafter set forth.

ARGUMENT

I

THE MERGER AND CONTROL OF UNITED PARCEL SERVICE OF AMERICA ARE NOT IN THE PUBLIC INTEREST SINCE THEY WILL ONLY SERVE TO MASK THE ILLEGAL ACTS OF ITS SUBSIDIARIES

United Parcel Service of Ohio ["UPS(Ohio)"] and United Parcel Service of New York ("UPS(NY)"] are the wholly owned subsidiaries of the holding company, United Parcel Service of America, Inc. ["UPSA"]. UPS(Ohio) already is the largest, single motor carrier regulated by the Commission, and the merger will give it operating revenues nearly twice that of any other motor carrier. The proposed merger will not result in the implementation of any service benefits or improvements to the public.

Moreover, the purpose of the merger is not corporate simplification, as has been argued, but rather to conceal subsidization of below cost operations in the area in which Protestants compete and to obtain unwitting government sanction for the anticompetitive acts perpetrated by UPS (Ohio), UPS(NY) and UPSA. Applicants undoubtedly hope that approval of the merger and control will whitewash their prior illegal practices.

Protestants submit that UPSA, UPS(Ohio) and UPS (NY) deliberately used separate corporate entities in order to further their anticompetitive scheme to monopolize small parcel service and to move money between the various entities in order to finance and subsidize anticompetitive actions. UPSA received huge amounts of money from both UPS(Ohio) and UPS(NY) through so-called management or service fees which greatly exceeded the actual cost of such services, and then funnelled funds to whichever carrier needed them. As explained hereafter, agreements between the two carriers and UPSA to fix rates, to refuse to deal with other carriers, and to make acquisitions and pooling arrangements without the required approval of the Commission, clearly violate the antitrust laws of the United States, as has already been found by the court in *Marnell, et al. v. United Parcel Service of America, Inc., et al.*, 1971 Tr. Cases ¶73,761 (N.D.Cal. 1971).

Common control of UPS(Ohio) and UPS(NY) by UPSA does not immunize them from the application of the antitrust laws. On the contrary, this common control has been a primary means used by Applicants to carry out flagrant and continuing violations of the law.

This Court has repeatedly held that the antitrust laws apply equally to conspiracies between companies which are affiliated or integrated under common ownership, as they do to companies not commonly owned. *United States v. Citizens & Southern National Bank,* 45 L.Ed.2d 41 (1975); *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134 (1968); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211 (1951); *United States v. Yellow Cab Co.,* 332 U.S. 218 (1947). As the Supreme Court stated in the *Yellow Cab* case: "The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act," since a restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." (332 U.S. at 227).

UPSA, UPS (Ohio) and UPS (N.Y.) have agreed to charge uniform rates for their services, regardless of the areas or costs involved, and have further agreed to subsidize losses in areas where the uniform rates are not profitable.

The Commission has strongly condemned noncompensatory rates as unlawful under the Interstate Commerce Act. *See Rules to Govern the Assembling and Presenting of Cost Evidence,* 337 I.C.C. 298, 310-311 (1970). It is therefore clear that motor carriers may not discuss or agree to fix rates except in the context of a rate conference in which the strict requirements of Section 5a (49 U.S.C. §5(6)) are followed.

In addition, conspiracies to fix rates have repeatedly been held to be *per se* violations of the antitrust laws. See *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211 (1951); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927). Similarly, courts have consistently held that below cost sales or rates in one area which are subsidized by profits from other areas violate the antitrust laws. *Utah Pie Co. v. Continental Baking Co.,* 386 U.S. 685 (1967); *Continental Baking Co. v. Old Homestead Bread Co.,* 476 F.2d 97 (10th Cir.), *cert. denied,* 414 U.S. 975 (1973).

The filing of uniform interstate rates at the same time by UPS(Ohio) and UPS(NY) will violate §5a, if it can be shown that the two companies agreed to file such rates outside a rate conference approved under Section 5a. Any rate fixing agreement between these separate entities is particularly pernicious, because one corporation has agreed with another concerning rates which apply to movements entirely within the operating area of only one of them, and with which the other could have no legitimate concern. The agreement ignores all local or regional costs. And lastly, the price fixing has the intent and inherent anticompetitive effect of below cost operations in some areas, high profit operations in others wherein, by agreement entered into with UPSA, the latter subsidizes the former. This rate fixing clearly discriminates against shippers, requiring those in one area of the country to subsidize those in another area.

Moreover, and in addition to their rate fixing activity, both UPS(Ohio) and UPS(New York) have agreed that

they will refuse to interline or enter into joint rate agreements with other carriers. It is well established that concerted or individual refusals to deal with a competitor which are motivated by a purpose of obtaining or preserving a monopoly are illegal under the Sherman Act. *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973); *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951).

Applicants' conspiracy not to interline or to enter into joint rate agreements is also contrary to the Commission's policy of encouraging such arrangements in order to achieve a unified motor carrier system. *Restrictions on Service by Motor Carriers Ex Parte No. MC-77 (Sub. 1),* 119 M.C.C. 691 (1974).

The agreement between UPSA, UPS(Ohio) and UPS (NY) not to deal with other carriers is part of their overall scheme to eliminate other carriers of small parcels and to prevent any such carrier from expanding its scope of operations. Such a scheme violates the National Transportation Policy as well as the antitrust laws.

In the final analysis, the merger and control of UPSA and its subsidiaries will adversely affect Protestants because it will help UPS conceal the subsidization of below cost rates in their area and will allow UPSA to control the surviving carrier and continue to subsidize loss operations in Protestants' area. After the merger UPS can simply present the Commission with financial figures for the UPS nationwide system as a whole without any breakdown for East Coast operations which have consistently been more

costly to operate. UPS would undoubtedly use the fact that the Commission had approved the creation of one UPS company to hold all interstate common carrier authority to justify uniform rates, even though Protestants have challenged the lawfulness of such rates which destroy competition in high cost areas such as New York City. Thus, the proposed merger is simply one step in a coordinated effort by UPS to conceal the anticompetitive impact of its rates and practices on Protestants.

II

THE DECISION BY THE INTERSTATE COMMERCE COMMISSION WAS IN ACCORD WITH THE DECISIONAL PRECEDENTS AND THE MERGER OF UNITED PARCEL SERVICE, INC., A NEW YORK CORPORATION INTO UNITED PARCEL SERVICE, INC., AN OHIO CORPORATION WILL CONSTITUTE AN ACQUISITION OF CONTROL WITHIN THE MEANING OF SECTION 5(2) OF THE INTERSTATE COMMERCE ACT[1]

The Supreme Court of the United States has held that term "control" as used in Section 5(2) of the Interstate Commerce Act should be given the widest possible scope. *United States v. Marshall Transport Co.,* 322 U.S. 31, 38 (1944). Rearrangement, alteration or tightening of control can constitute "acquisition of control" within the meaning

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[1]Pursuant to the Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, the Interstate Commerce Act was revised, codified and enacted, without substantive change, as subtitle IV of Title 49, United States Code § 10101 *et seq.* This proceeding was filed and decided by the Commission prior to the above date and the decision under review refers to the former sections of the Act. Thus, for purposes of clarity, this brief will refer to the former sections of the Interstate Commerce Act.

of Section 5(2). *New York Central Securities Corp. v. United States* 287 U.S. 12 (1932).

The merger of one carrier into another carrier, whether or not there had been prior common control, constitutes the very action that brings into play the Commission's jurisdiction under Section 5(2). Inherent in this statutory provision is the Commission's jurisdiction in subdivision (b) thereof to impose "such terms and conditions and such modifications as it shall find to be just and reasonable", provided the proposed transaction is one within the scope of subdivision (a) and, "will be consistent with the public interest".

The Applicants' attempt to distinguish *Alleghany Corporation v. Breswick & Company* 353 U.S. 151 (1957) is of no avail. There, the Supreme Court stated:

> "The crux of each inquiry to determine whether there has been an 'acquisition of control' is the nature of the change in relations between the companies whose proposed transaction is before the Commission for approval. Does the transaction accomplish a significant increase in the power of one over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease? This is the issue, and not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the Marshall Transport Case, the parent can always, by operating through subsidiaries, make itself more remote. In deciding this type of issue, of course, the finding of the Commission that a given transaction does or does not constitute a significant increase in the power of one company over another is not to be overruled so long as 'there is warrant in the record for the

> judgment of the expert body . . .' Rochester Tel. Corp. v. United States 307 US 125, 146, 83 L ed 1147, 1161, 59 S Ct 754 . . .
>
> The merger of the Jeffersonville into the Big Four virtually precludes any change in the relation of the Jeffersonville lines to the Central system. The Jeffersonville will be no more. In view of this, it cannot reasonably be said that there has been no increase in the power of the Big Four, the Central, and, through its relation with them, Alleghany over the Jeffersonville. While it is not always profitable to analogize 'fact' to 'fiction', LaFontaine's fable of the crow, the cheese, and the fox demonstrates that there is a substantial difference between holding a piece of cheese in the beak and putting it in the stomach.
>
> Denial of power to the Commission to regulate the elimination of the Jeffersonville from the national transportation scene would be a disregard of the responsibility placed on it by Congress to oversee combinations and consolidations of carriers and 'to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . .' and the further requirement that 'All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy' National Transportation Policy, 54 Stat 899, 49 USC, preceding § 1. We hold that the Commission was justified in finding that the merger of the Jeffersonville into the Big Four involved an 'acquisition of control' of the Jefferson by Central and Alleghany within the meaning of § 5(2) of the Act . . ." (*Id.* at 169-171)

It should be noted that the argument advanced by Petitioners herein was the identical argument made by the

appellees in the *Alleghany* case, *supra* and was adopted by the District Court, but, as set forth above, reversed by the Supreme Court. See *Alleghany Corp. v. Breswick & Co.*, 353 U.S., at 165.

In their extensive citation of, and reliance upon *Alleghany, supra,* petitioners have completely overlooked the subsequent Court proceedings and decisions in the same matter. There was protracted litigation involving many issues, with decision at 156 F. Supp. 227, rev'd per curiam, 355 U.S. 374, 160 F. Supp. 754. On the second remand from the Supreme Court, the District Court, in 160 F. Supp. 754, vacated the injunction previously issued.

In a related proceeding, *Neisloss v. Bush,* 293 F. 2d 873, the Court held that (1) under Section 5(2) Commission approval was necessary for the merger of the subsidiaries of the New York Central and that Alleghany was a necessary party to the merger proceedings, (2) Section 5(2) provides that the Commission must approve whenever a non-carrier already controlling one or more carriers acquires control of another carrier, (3) the merger of one New York Central subsidiary into another was deemed the acquisition of control of the merged carrier by Alleghany, a non-carrier already controlling a carrier (New York Central), and (4) that having authorized this acquisition by Alleghany under Section 5(2), the Commission was empowered by Section 5(3) to establish its exclusive jurisdiction by declaring that Alleghany should be considered a carrier, and the Commission did so.

Contrary to the Petitioners' argument on distinguishing *Alleghany* from the instant merger application, the ultimate result, as noted above, supports the Commission's finding that United Parcel of America, Inc. be considered a carrier under Section 5(4) of the Act.

Here, there is a proposed change in status, through a merger, which involves control of the merged carrier under an application pursuant to section 5(2) of the Act, and the principle in *Neisloss v. Bush, supra,* governs. See also *Superior Trucking Co.-Purchase-Hamm,* 109 M.C.C. 294, 297 (1969) *Artim Transp. System, Inc.-Control and Merger-Glen Cartage,* 116 M.C.C. 812, 819 (1974), and *Thurston, Inc.-Control-Bush Motor Freight,* 116 M.C.C. 115, 121 (1972), all of which are proceedings subsequent to *Alleghany,* which follow the principal enunciated by the Supreme Court therein.

The precedents cited by Petitioners are inapposite. In *Transcontinental Bus System, Inc.-Control-American Buslines, Inc.,* 87 M.C.C. 795 (1961), the applicant was a carrier operating under authority from the Commission, and common control of all the carriers involved had been approved in a number of proceedings under section 5 (795-6). *Brink's Express Co. of Canada, Ltd.-Control-Direct Winters Transport Ltd.,* 101 M.C.C. 639 (1966), involved no change in status of the carriers, and jurisdiction in the finance docket was declined because the application was by a Canadian corporation for the issuance of securities in Canada subject to approval which had been obtained from Canadian authorities. In addition, it was found that there was no conceivable interline between the commonly controlled carriers.

The decision in *Woods Industries, Inc.-Control-United Transports, Inc.*, 85 M.C.C. 675 (1960), cited by applicants, applied to an entirely different factual situation. The parent corporation in *Woods* also controlled two companies engaged in the storage and servicing of automobiles, and a company engaged principally in the exploration of oil and gas and the drilling of oil and gas wells. The rationale of the decision was that with the holding company engaged in various businesses and activities bearing no relationship to transportation, and with transportation providing only a minor portion of its income, no useful purpose would be served for this Commission to monitor the various non-transportation activities and financial transactions entailed therein. Accordingly, such parent corporation could not and should not be considered as a carrier.

Here, however, the parent corporation, UPSA, dedicates its entire attention to the instrumentalities of transportation, from which it derives its entire income, either directly from the carriers or from the proceeds of investment of funds previously received from the carriers.

The sole question for determination herein is whether UPSA was properly found to be a carrier. More to the point, it is respectfully submitted, is the finding in *Superior Trucking Co. -Purchase-Daniel Hamm, supra,* at pages 296-297:

> "This Commission has consistently held that when a noncarrier corporation is substantially engaged in transportation activities, the proper administration of our duties under the act requires that our jurisdiction should extend to said company, and that it be treated as a motor carrier subject to the reporting, accounting and securities provisions of the act. Pittston Co.-Control-Brink's Inc., 75 M.C.C. 345; N.C. Purdie Corp.-Purchase-Hoffman's Motor Transp., 56 M.C.C. 495; Edwards M. Transit Co.-Purchase-Johnston M. Bus Lines, 55 M.C.C. 515; Peoples Transfer, Inc.-Purchase-Hodges, 50 M.C.C. 336"

Corporate simplification indeed may not be in the public interest under the facts and circumstances of this case, unless the Commission is able to exercise its continuing jurisdiction over both UPS(Ohio), as the surviving carrier, and UPSA, its parent as well as the parent of as many as 100 other subsidiary companies. The corporate simplification argument is a fiction and the existence of UPSA's scores of subsidiaries belies any argument made with respect to corporate simplification. Merely because the Petitioners threaten not to conclude the merger if the Commission's decision regarding control of the parent company is not reversed, has no bearing on what the law itself requires. Petitioner's non-legal argument regarding corporate simplification cannot avoid the *Alleghany* decision and surely, in its wisdom, the Commission could well find that consistency with the public interest in UPS' case requires the reasonable terms and conditions which the Commission imposed.

CONCLUSION

The merger and control advocated by Applicants will not further the public interest. On the contrary, such a result will only serve to mask the unlawful and anticompetitive acts presently engaged in by Applicants.

In addition, since the Commission may require that its surveillance will be maintained following a merger of one carrier into another, the Commission in this instance may retain control over the parent company, UPSA. Accordingly, the portion of the Commission's decision and order which found UPSA to be a carrier under Section 5(4) of the Interstate Commerce Act, by reason of the merger of two subsidiary carriers, and the imposition thereby of such terms and conditions as the Commission found to be just and reasonable, should be affirmed.

Dated: San Francisco, California
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Respectfully submitted,

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